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With this issue, the COLUMBIA LAW REVIEW is establishing a department of current legislation, in which it is proposed to bring to the attention of readers such recent statutes as reflect important legislative tendencies, or are of general interest to the legal profession because of their imposition of extraordinary liabilities, their effect on large classes of business, or the sweeping social reforms which they inaugurate. It is believed that, with the rapidly increasing substitution of statutory for judge-made law, a progressive legal publication can no longer afford to neglect the legislative field; and in this department some of the striking and important measures will be from time to time reviewed, criticized, and compared.

NOTES.

BELLIGERENT INTERFERENCE WITH POSTAL CORRESPONDENCE.—The contentions of the memorandum of the Allied governments of February 15th, 1916, in reply to the request of the State Department that the inviolability of postal correspondence be respected, were as follows:[1]

[1]European War, No. 3, Diplomatic Correspondence Relating to Neutral Rights and Duties, 150.

(1) That from the standpoint of visit and search parcels post packages should not be treated differently from merchandise; (2) That the inviolability of postal correspondence under the 1st Article of the 11th Hague Convention of 1907 does not affect the right of the Allied governments to visit and search merchandise hidden in envelopes or wrappers contained in mail bags; (3) That they will continue not to seize and confiscate "genuine correspondence" but will insure its speediest possible transmission as soon as the sincerity of its character is discovered.

The United States agreed that parcels post mail might be treated as merchandise, assured the Allies that the two governments were in accord in principle, but objected to the arbitrary manner in which the principle was applied.[2] The whole controversy seemed to centre round the inviolability of what was called "genuine correspondence". The United States gave a list of contraband which the Allies could confiscate. In this class were placed negotiable instruments and securities. Money-order lists, shipping documents, even though relating to "enemy supplies or exports", unless carried on the same ship as the property referred to, were to be regarded as "genuine correspondence", and entitled to unmolested passage.[3] The reply to this communication under date of October 12th declared that the inspection of private mails to discover whether they contained contraband necessarily implied the opening of the covers and could not be carried on conveniently on the high seas.[4] It is on this point that the position of our government seems weak. Apparently our contention is that "genuine correspondence" is to be regarded as entitled to unmolested passage. How can it be possible to grant the right to stop contraband in envelopes and yet claim for "genuine correspondence" inviolability, thus implying that the seals of letters must not be broken?[5] The practice of nations had been in the direction of leniency in allowing immunity from search and seizure to mails[6] until the Russo-Japanese

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[2] *Ibid.* 152.

[3] *Ibid.* 156.

[4] The British Ambassador to Mr. Lansing, Sec. of State.

[5] Dana, in a note to Wheaton's International Law, makes the broad statement that the law allows immunity from search to no deposit of information. He adds that the danger of granting immunity to postal correspondence would be that the neutral might carry despatches for the enemy or perform unneutral service under cover of this exemption. This shows that the immunity discussed meant immunity from search and not only from seizure. Dana's Wheaton, 659, n. 228 *et seq.*

[6] "Neutral non-commercial mail packets" were allowed to enter and depart from Tampico while under blockade by United States forces. Dana's Wheaton, 659, n. 228. During the Civil War a dispute arose with England about the mails on the Peterhoff, and Secretary Seward gave orders that "public mails of any friendly or neutral power should not be searched or opened" but put on their way, in case of capture of a merchant ship. 7 Moore, Digest, 481. France in 1870 declared that neutral mail sacks should not be searched provided that a mail agent of the neutral state swore to their innocuous character. C. Dupuis, Droit de La Guerre Maritime, 215. President McKinley at the beginning of the Spanish American War declared that voyages of mail steamers should only be interfered with on grounds of clearest suspicion of violation of blockade or carriage of contraband. 7 Moore, Dig. 480. England granted a similar indulgence to Germany during the Boer War. Lawrence, War & Neutrality in the Far East (2nd ed.) 190.

war of 1904. It is true that during that war the Russian government did cause a seizure and examination of mails on neutral ships,[7] but this action was criticised most severely as reactionary by at least two English writers.[8] While most publicists agreed that prior to the 11th Hague Convention of 1907 the custom of allowing exemption from seizure to mails had not ripened into obligatory law,[9] they are in accord as to the advisability of such a law. It is considered that the belligerent does not derive sufficient benefit from being permitted to open the mails in proportion to the damage done to innocent commercial relations.[10] The provisions of Article 1 of the 11th Hague Convention of 1907 were introduced at the suggestion of the German delegate, Herr Kriege, who declared that it was extremely desirable to shelter commercial interests and innocent correspondence from the disturbances of maritime warfare, and that it was hardly probable that belligerents would have recourse to postal service for the transmission of despatches, owing to the better method offered by telegraphy.[11] The Allied governments maintain that the first article of the 11th Hague Convention referred to above granted inviolability only to "genuine correspondence" or "missive letters".[12] Their contention then is that in searching mails and opening envelopes there is no violation[13] of the practice which the Hague Convention attempted to establish. This attitude is unsupportable, since in the search for contraband in the form of negotiable instruments or bonds the seals of "genuine correspondence" must necessarily be violated.[14]

Apparently a better position for our government from a purely legal standpoint would have been to declare in our note of May 24th, 1916, that the Allied governments had no right to interfere with sealed envelopes which did not clearly contain merchandise. In admitting

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[7]The Calchas (1904) 1 Russ. & Jap. Prize Cases, 118; 2 Oppenheim, Int. Law, 454.

[8]Lawrence, *op. cit.* 197; Higgins, Hague Peace Conferences, 402.

[9]Wheaton's Int. Law (5th English ed. by C. Philipson) 562; 2 Pitt Cobbett, Leading Cases on Int. Law, 174, Note C; 2 Oppenheim, *op. cit.* 453-4.

[10]Dupuis, *op. cit.* 215, n. 2; Lawrence, *op. cit.* 192; Higgins, *op. cit.* 401.

[11]Dupuis, *op. cit.* 215; Wehberg, Capture in War on Land & Sea, 90. The proposition met with practically unanimous acceptance, though Russia did not sign the Convention. Higgins, *op. cit.* 401. It is therefore not binding, as all the belligerents have not signed it. 11th Hague Convention of 1907, Art. 9.

[12]See note 1, *supra.*

[13]The Allied governments declared they were following the provisions of the Hague Convention, reasonably interpreted, but stated that as the Convention was not binding, see note 11, *supra,* they expressly reserved the right to depart from such practice in case enemy frauds and abuses made it necessary. British Ambassador to Mr. Lansing, Sec. of State, October 12th, 1916.

[14]See note 5, *supra.* This is also illustrated by the fact that several writers in speaking of the Hague Convention compared the loss to the belligerents arising from a denial of the right of search and the resultant advantage to neutrals. See note 10, *supra.* There certainly would be no question of loss as regards the belligerents if they were entitled to open envelopes in the search for contraband, since there would then be no restriction on the right of search. It must be noted carefully that the Hague Convention referred to did not exempt mail steamers themselves from search. 11th Hague Convention of 1907, Art. 9.

the right to search for negotiable instruments and securities, we have impliedly admitted the right to break the covers and delay the transmission of "genuine correspondence". Perhaps the answer of the State Department to the British communication of October 12th, which has not yet been given out, will make our position more clear and consistent.

WAR AS EXCUSE FOR FAILURE TO PERFORM CONTRACT.—Whether the fact that a war has rendered impossible the performance of a contract will serve to excuse failure to perform it is, of course, dependent primarily on the proper formulation of the rule as to impossibility of performance in general. The difficulties attendant on the framing of any satisfactory rule are obvious; but a statement of the principle may perhaps be attempted as follows: impossibility of performance, *per se*, is never an excuse; but where, from all the circumstances of the case, the parties may be said to have intended that a condition be implied in fact, to the effect that the cause of the impossibility do not occur, then, the condition having been broken, performance is excused.[1] If, then, this be taken as the rule, performance of a contract rendered impossible by war will be excused only when the parties may fairly be said to have intended one of two conditions to be made a part of the contract: either (1) that performance be not rendered impossible by any cause whatever,—which, of course, would include war; or (2) that performance be not rendered impossible by certain specific causes, including war.[2]

Ordinarily, of course, no such condition is to be implied, and therefore, in the normal case, impossibility caused by war does not excuse failure to perform. This appears clearly where the undertaking is intended by the parties to be absolute.[3] Then, on the other hand, it is equally obvious that, where there is an express or implied affirmative term in the contract, impossibility caused by war will not serve as an excuse.[4] But whether, in any particular case, a condition is to be implied excusing performance when war makes it impossible, one is almost never implied where performance is merely rendered extremely

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[1] *Cf.* Anson, Contracts (11th ed.) 396; Wald's Pollock, Contracts (Williston's ed.) 520; 1 Columbia Law Rev. 529; 11 *id.* 83. For the general subject, see Trotter, Law of Contract During War, 54.

[2] Somewhat similar principles govern where the defense to an action on contract is based on the theory that the consideration for the defendant's promise has failed, since it is impossible, because of a war, for the plaintiff to perform his side of the contract. This class of cases is often confounded with the type of cases properly under discussion here, *viz.*, those cases where the defense is that it is impossible for the defendant to carry out his promise. They are really distinct, however. Paradine *v.* Jane (1648) Aleyn 26 (which is usually cited as the leading case on impossibility of performance, but is really a case of failure of consideration); Robinson *v.* L'Engle (1870) 13 Fla. 482, 495; *cf.* Leiston Gas Co. *v.* Leiston-cum-Sizewell etc. Council [1916] 2 K. B. 428; but *cf.* Bayly *v.* Lawrence (S. C. 1792) 1 Bay, 499.

[3] Jacobs, Marcus & Co. *v.* Crédit Lyonnais (1884) 12 Q. B. D. 589; Ashmore & Son *v.* Cox & Co. [1899] 1 Q. B. 436; *cf.* Hadley *v.* Clarke (1799) 8 T. R. 259.

[4] De Medeiros *v.* Hill (1831) 5 Car. & P. 182; Smith & Co. *v.* Morse & Co. (1868) 20 La. Ann. 220; *cf.* Geipel *v.* Smith (1872) 7 Q. B. 404.